Filed 6/5/17 P. v. O.M. CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. O.M., Defendant and Appellant.	2d Crim. No. B275695 (Super. Ct. No. 2012032251) (Ventura County)

O.M. appeals the juvenile court's order committing him to the Division of Juvenile Facilities (DJF). (Welf. & Inst. Code,[1] § 602.) Appellant contends the order was an abuse of discretion. We affirm.

FACTS AND PROCEDURAL HISTORY

In September 2012, a delinquency petition was filed against appellant alleging public intoxication (Pen. Code, § 647,

[1] All statutory references are to the Welfare an Institutions Code unless otherwise stated.

subd. (f)). Appellant admitted the allegations of the petition and was declared a ward of the court and placed on probation.

In March 2013, a notice of charged violation was filed along with a subsequent petition alleging that appellant had committed second degree robbery (Pen. Code, § 211) with attendant gang and personal weapon use enhancement allegations (§§ 186.22, subd. (b), 12022, subd. (b)(1)). The gang enhancement allegation was subsequently withdrawn. The court sustained the allegations of the subsequent petition following a contested hearing and ordered a psychological evaluation. Appellant was continued as a ward, sentenced to serve no more than 300 days in juvenile hall, and ordered to pay victim restitution along with various fines and fees.

In January 2014, a notice of charged violations was filed alleging that appellant had made a criminal threat (Pen. Code, § 422), used a controlled substance, violated curfew, associated with gang members, failed to report to probation or submit to drug testing, and failed to follow the orders of his probation officer. Appellant admitted the violations, was continued on probation, and was ordered to spend no more than 90 days in the Juvenile Justice Facility (JJF).

Appellant was released from the JJF in April 2014. The following month, a notice of charged violations was filed alleging that appellant had used a controlled substance, associated with gang members, and failed to report to probation, submit to alcohol and drug testing, or attend a drug program. Two weeks later, appellant was charged in another notice with using a controlled substance, possessing stolen property, associating with gang members, and failing to obey laws, report to probation, submit to alcohol and drug tests, and attend a drug program.

Appellant denied the allegations of both notices. Another psychological assessment was ordered at counsel's request. The allegations that appellant possessed stolen property and failed to submit to alcohol testing were subsequently dismissed and appellant admitted the remaining allegations.

At the September 2014 disposition hearing, the court received a psychological report indicating that appellant had been diagnosed with several disorders including Attention Deficit/Hyperactivity Disorder, bipolar disorder, anxiety disorder, conduct disorder, and polysubstance abuse and dependence. The report recommended that appellant be placed at the JJF rather than committed to the DJF. At the conclusion of the hearing, the court continued appellant as a ward and ordered him to serve 360 days in the JJF with credit for 111 days served. In December 2014, appellant was granted early release on electronic monitoring over the prosecution's objection. Appellant's remaining 138 days of custody were stayed pending further review.

In July 2015, appellant's probation officer reported that appellant had admitted drinking alcohol and smoking marijuana and had refused drug testing. He had also failed to enroll in school or report to probation. At probation's request, the court ordered appellant to serve the previously stayed 138 days and sent him to juvenile hall. The court further ordered that appellant be transferred to the county jail after he turned 19 in October 2015, as provided in section 208.5.

In August 2015, a notice of charged violations was filed alleging that appellant was not complying with rules at juvenile hall. Appellant admitted the allegation after an initial denial and was ordered to served 150 days in the county jail.

Appellant was released on probation in January 2016. The following April, yet another notice of charged violations was filed alleging that appellant had used a controlled substance and associated with gang members and had failed to report to probation, comply with his curfew, submit to alcohol and drug testing, and attend drug and alcohol counseling. Appellant admitted the allegations.

At disposition, defense counsel asked the court to place appellant in Victory Outreach, a residential drug treatment program in Oxnard. The court denied the request, terminated probation, and committed appellant to the DJF for a maximum term of six years and two months.

DISCUSSION

Appellant contends the court abused its discretion in committing him to the DJF because there was no evidence he would benefit from the commitment and/or that less restrictive alternatives would be ineffective or inappropriate. We disagree.

"No ward of the juvenile court shall be committed to the [California] Youth Authority unless the judge of the court is fully satisfied that the mental and physical condition and qualifications of the ward are such as to render it probable that he will be benefited by the reformatory educational discipline or other treatment provided by the Youth Authority."[2] (§ 734.) To order a DJF commitment, "'there must be evidence in the record demonstrating both a probable benefit to the minor by a [DJF]

---

[2] The California Youth Authority eventually became known as the Division of Juvenile Facilities (DJF), part of the Division of Juvenile Justice, which is part of the Department of Corrections and Development. DJF and DJJ are often used interchangeably. (*In re Albert W.* (2015) 240 Cal.App.4th 411, 413-414, fn. 1.)

commitment and the inappropriateness or ineffectiveness of less restrictive alternatives.' [Citation.]" (*In re Jonathan T.* (2008) 166 Cal.App.4th 474, 485.) We evaluate the court's exercise of discretion in committing a minor to the DJF "with punishment, public safety, and protection in mind." (*In re Luisa Z.* (2000) 78 Cal.App.4th 978, 987-988.)

"A juvenile court's commitment order may be reversed on appeal only upon a showing the court abused its discretion. [Citation.]" (*In re Robert H.* (2002) 96 Cal.App.4th 1317, 1329-1330.) We will not lightly substitute our judgment for that of the juvenile court. Rather, we must indulge all reasonable inferences in favor of the decision and affirm the decision if it is supported by substantial evidence. (*Id.* at p. 1330.) Substantial evidence is evidence that is "reasonable, credible, and of solid value—from which a reasonable trier of fact could have made the requisite finding under the governing standard of proof. [Citation.]" (*In re Jorge G.* (2004) 117 Cal.App.4th 931, 942.)

Appellant does not dispute that the court expressly found he would benefit from a DJF commitment. Indeed, he acknowledges that the court made this finding "in good faith[.]" He nevertheless claims, for the first time on appeal, that the DJF is currently unable to provide a probable benefit to *anyone* due to longstanding institutional problems that have yet to be rectified. In support of this claim, appellant purports to offer "[r]ecent reports based on official data and court documents [that] demonstrate serious continuing problems at the DJF's facilities" following the February 2014 dismissal of the consent decree in *Farrell v. Allen* (2004, No. RG03079344), which required the development of plans to correct deficiencies at the DJJ.

Appellant's claim was not raised below and is thus forfeited. Moreover, our review of the challenged order is limited to evidence that was actually presented to and considered by the lower court. (*In re Zeth S.* (2003) 31 Cal.4th 396, 405.) None of appellant's proffered "reports" and "court documents" were presented below; indeed, some of the reports did not yet exist. It is well-settled that an appealing party cannot "challenge a lower court's ruling and then 'augment the record' with information not presented to (or withheld from) the lower court. [Citation.]" (*People v. Brown* (1993) 6 Cal.4th 322, 332.)

In replying to the People's contention that the newly proffered evidence is not properly before this court, appellant offers that "[c]itation to published research material is commonplace." The practice is neither commonplace nor proper where, as here, the proffered evidence was not offered below.

On the record properly before us, there is ample evidence to support the court's finding that appellant will benefit from a DJF commitment. Appellant's probation officer properly characterized his performance on probation as "horrendous." The court noted that appellant "just blew off probation" after the department "had kind of bent over backwards to give [him] the opportunity to straighten out." The court told appellant: "I am fully satisfied that the appropriate place for you is DJJ. I might not have come to that conclusion 15 years ago. . . . Because, for example, 15 years ago, there were roughly 11,000 kids at what was then known as California Youth Authority. Today there are about 750. That's because the juvenile justice community throughout the state insisted that the Youth Authority start delivering the services that they were saying they could and they should by statute. The services that are there now or as referenced in that

code section, the reformatory, educational, discipline and other treatment, it's good." Appellant fails to demonstrate that the court's ruling was an abuse of discretion. (See *In re Luisa Z.*, *supra*, 78 Cal.App.4th at pp. 987-988; see also *In re Greg F.* (2012) 55 Cal.4th 393, 417 [noting that "[t]he DJF has many rehabilitative programs that can benefit delinquent wards" and that "[s]ome wards . . . may be best served by the structured institutional environment and special programs available only at the DJF"].)[3]

Appellant also fails to show that a DJF commitment was precluded by a less restrictive alternative, i.e, Victory Outreach. As the prosecutor stated, appellant "has more than just a drug problem. He has a theft problem, he has a lot of issues, gang involvement, that need to be addressed, and at this point, the [DJJ] is the institution that can best address those issues." In rejecting the request to place appellant at Victory Outreach, the court reiterated the prosecutor's remarks and noted that "punishment is a component of juvenile justice." In light of the record, the court did not abuse its discretion in rejecting Victory Outreach as a suitable alternative to a DJF commitment.

---

[3] Appellant also asserts for the first time on appeal that the court erred in relying on an "outdated" DJF screening conducted in September 2014. Aside from being forfeited, the claim lacks merit because appellant fails to demonstrate that the passage of time had rendered the DJF screening invalid. Appellant also overlooks the fact that another DJF screening was conducted in October 2015, the results of which were virtually identical to those in the prior screening.

DISPOSITION

The judgment (order committing appellant to DJF) is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Brian J. Back, Judge
Superior Court County of Ventura

Laini Millar Melnick, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Mathews, Supervising Deputy Attorney General, Analee J. Brodie, Deputy Attorney General, for Plaintiff and Respondent.